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No. 85-2167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, a co-partnership d/b/a J.R.R. REALTY CO.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INTERVENOR, LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION

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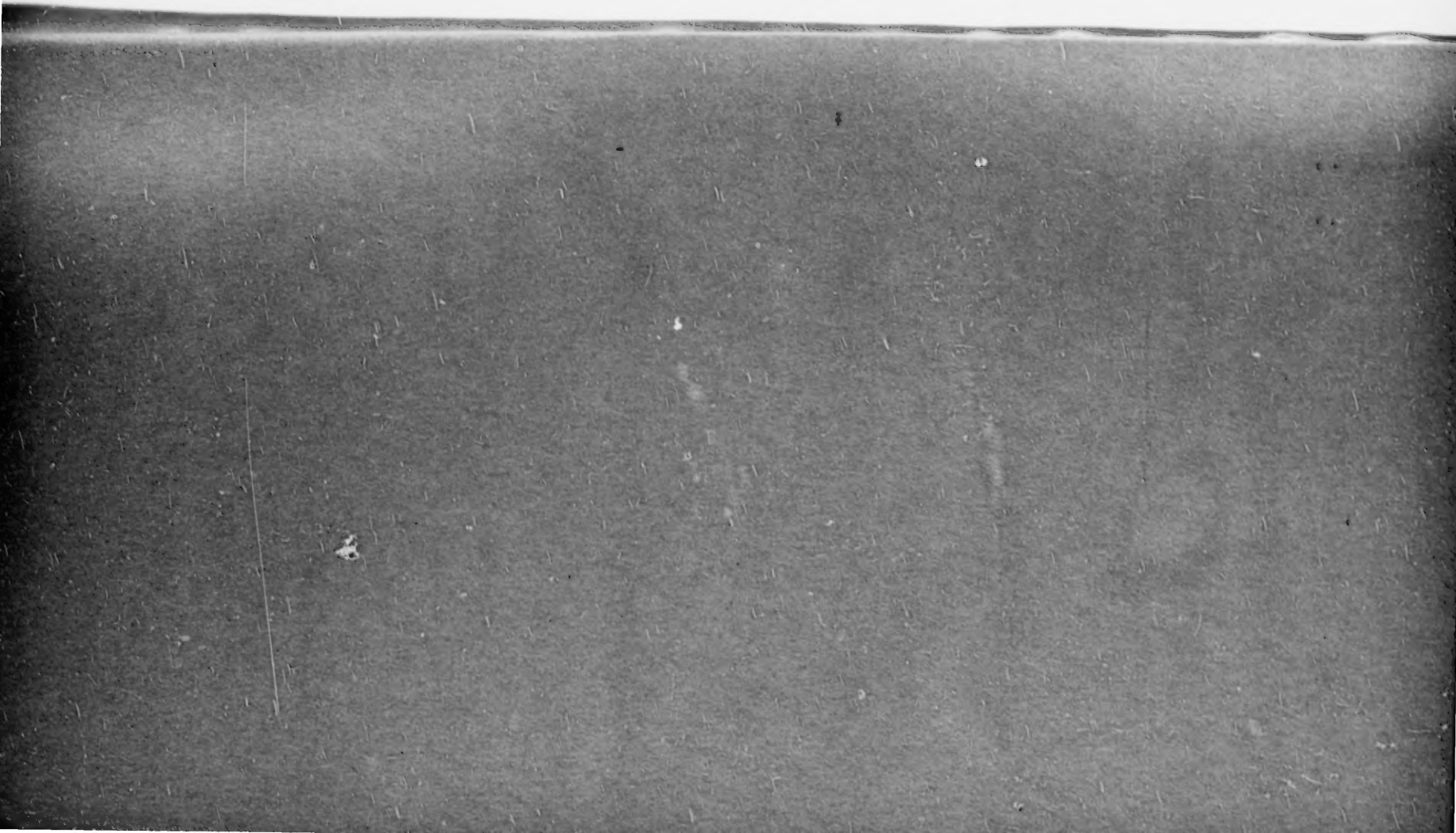

QUESTION PRESENTED

Whether the National Labor Relations Board properly found in the circumstances that a successor employer assumed its predecessor's collective bargaining agreement and that it violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1), (3) and (5), by refusing to retain the employees of the predecessor, by refusing to honor the collective bargaining agreement of its predecessor and by refusing to recognize and bargain with the union

that had represented the predecessor's employees.[1]

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[1]Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Union, as a party to the proceeding in the court from which judgment is being taken, files this Brief in Opposition.

OPINIONS BELOW

The opinion of the United States Court of Appeals below, Docket No. 85-2167, is reported at ___F2 ____. It is appended as Appendix "A" to J.R.R.'s Petition for Writ of Certiorari. That opinion enforced an Order of the National Labor Relations Board (hereinafter "NLRB").

The opinion of the NLRB below is reported at 273 NLRB No. 189 (1985). Said Order adopted the findings of the Board's Administrative Law Judge (hereinafter ("ALJ"). Both opinions are appended as Appendix "B" to J.R.R.'s Petition to Writ of Certiorari.

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JURISDICTION

The judgment of the Court of Appeals (Pet. App. A1) was entered on March 4, 1986. The Petition for a writ of certiorari was filed in the last week of June, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

STATUTES

29 U.S.C. 157:

> Sec. 7. Employes shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall so have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. 158(a)(1)(3) and (5)

> Sec. 8. (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the

exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of emplyment or any term or condition of emplyment to encourage or discourage membership in any labor organization: Provided that nothing in this Act, or in any other statute of the United States, shall preclulde an employer from making an agreement with a labor organization (not established, maintained, or aassisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective bargaining unit covered by such

agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable ground for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (b) if he has reasonable grounds for belieiving that membership was denied or terminated for reasons other than the failure of the emplyee to tender the periodic dues and the initiation fees uniformly

reqeuired as a
condition of acquiring
or retaining
membership;

(5) to refuse to bargin
collectively with the
representative of his
employees, subject to
the provisions of
section 9(a).

STATEMENT

Historically, the Union represented the building service employees employed at an apartment building located at 73-37 Austin Street in Forest Hills, Queens, New York. The employer who owned the building prior to the Petitioner, J.R.R. Realty Co., herein J.R.R., was party to a collective bargaining agreement with the Union. The agreement was dated August 27, 1979 and was to remain in effect until April 20, 1982 and thereafter until such time as the parties negotiated a successor collective bargaining agreement. The collective bargaining agreement was between an entity J.A.R. Management and the Union.

On November 6, 1980, the prior owner contracted to sell the

property at 73-37 Austin Street to an entity Joshua Estates Inc. This agreement was executed on behalf of Joshua Estates by Harry Newman, its Vice President. Newman was the attorney for the J.R.R. in these transactions and according to Newman he was acting merely as the nominee for the J.R.R. in connection with J.R.R's purchase of the premises.

Although J.R.R. contends that there was no assumption of the Union collective bargaining agreement by the purchaser of the premises, the written documents entered into between the Seller and J.R.R., or its nominee, Joshua Estates, Inc.,established to the contrary. Thus, in the contract of sale dated November 6, 1980 the parties agreed:

"Those service, maintenance, employment, Union contracts and concessionaire contracts and agreements identified in Schedule B and in effect on the Closing Date (Seller shall pay all wages, fees and amounts due and payable under all of said contract and agreements to the Closing Date, except those items to be apportioned at Closing pursuant to paragraph below); annexed hereto as schedule B and a listing of said contracts and agreements, which Seller represents are the only ones in effect, and copies thereof are being furnished to Purchaser or attached hereto."

The above proviso is preceded by the following language "the property is sold and will be conveyed, the Purchaser shall take same subject to the following Permitted Encumbrances."

Further on in the contract of sale, in a separate paragraph not related to this so-called "subject to" language, is the following provision:

"Purchaser acknowledged having examined and hereby approves the leases, service and maintenance contracts and agreements effecting the Property on the date hereof. At the Closing of title Purchaser shall execute and deliver to Seller an instrument under which Purchaser shall agree to take title subject to the payment and performance of all obligations of Seller under such leases, contracts and agreements or replacements thereof and new service and maintenance contracts then in effect. (As herein permitted) that arise on or after the Closing Date and shall further agree to idenmnify and hold Seller harmless against any and all claims and liabilities arising under such leases, contracts and agreements or said replacements thereof or new contracts that relate to matters or events occurring from and after the closing of title."

The contract of sale also included a provision for the apportionment and adjustment of employee wages, bonuses, vacations,

severance pay, pension and welfare benefits and other obligations payable to the emplyees by reason of the employment at the premises which would be apportioned as of the date of actual title closing. The contract of sale provided further that the Seller would represent that the full compensation of the employees regularly employed in conneciton with the operation of the premises was to be set forth on the payroll schedule. This schedule included union and welfare benefits, as well as vacation pay allowances. The contract of sale provided that at the closing the Seller would deliver to the purchaser all transferable service and maintenance contracts, employment agreements and other contracts listed in Schedule B.

In another reference to the Union contract, the contract of sale provided that the Seller represented to J.R.R. that the Union contract was not in default and would not be in default on the closing date. It is emphasized that notwithstanding the reference to the Union and the assumption of the Union contract as summarized above, in Schedule B, there was attached an actual copy of the Union contract.

Notwithstanding the language references to the Union contract and the contract of sale there were further discussions and documents signed at the closing of title relating to the assumption of the Union contract by J.R.R. In this regard at the closing of title on March 31, 1981 an assignment of contract of sale was executed by Harry Newman, the Vice

President of Joshua Estates, Inc., the nominee of the J.R.R.. This document provided for the transfer and assignment of all right, title and interest of Joshua to J.R.R. concerning the premises at 73-37 Austin Street. Thus, on paper we have seen that Joshua Estates and J.R.R. are nothing more than the identical entity.

An assignment was executed by the seller of the property assigned to J.R.R. all right, title and interest with regard to the Union contract. Additionally, an indemnity agreement was signed by Joshua Estates and J.R.R. Realty Company wherein both of them agree to take title to the premises "subject to the payment and performance of all obligations of Seller under the leases, contracts and agreements and

service and maintenance contracts in effect on March 31, 1981..."

In J.R.R.'s appeal it asserts that the language "subject to" does not mean that which it obviously means. However, a review of the record will establish that at no time was any evidence introduced that would support a conclusion that those words mean what J.R.R.'s counsel asserts them to mean. Specifically, attorney Newman, who represented J.R.R. in connection with the purchase of the property was fully aware of the intricacies of the sale and was party to the contract of sale. However, at no time was he called to testify on behalf of J.R.R. in support of its convoluted concepts of what the words "subject to" actually mean. It must be assumed that Newman would not have testified in the manner as is being

asserted by J.R.R. in connection with the instant appeal.

J.R.R. now asserts that the Board is collatearlly estopped from finding an assumption of the union contract due to the fact that the identical issue was presented for resolution before the New York Supreme Court and that the Court has concluded that no such assumption had been accomplished. Respondent is being intellectually dishonest in presenting this argument to this Court. Specifically, the decision of the Appellate Division of the New York Surpeme Court in overruling and reversing the Lower Court's stay of an arbitration stated:

> "Petitioners (J.R.R.) then moved to vacate the notice of intention to arbitrate arguing that the matter had been preempted by the NLRB proceeding.

> Special Term granted the motion; we conclude that there should be a modification."
>
> "While it is true that an NLRB proceeding ordinarily preempts an arbitration proceeding (See Matter of Bucholz, [Local 463], 15 A.D.2d 394, 244 N.Y.S.2d 638, aff'd 15 N.Y.2d 181, 257 N.Y.S.2d 134, 205 N.E.2d 282 (N.Y. Ct. App. 1965), in this case the NLRB cannot provide the union with relief against J.A.R. At best, the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latters contention that it is not bound by J.A.R.'s contract with the Union."

Thus, where J.R.R. at Page 8 of its petition, summarizes the New York proceeding, it is intentionally misleading the Court concerning the ultimate disposition of the matter before the Appellate Division. The Appellate Division, as has been demonstrated, specifically found that

it would not decide the question of J.R.R.'s being bound to the Union agreement specifically for the reason that that issue had been presented to the Board and it would be the Board which would make a determination concerning assumption. J.R.R.'s assertions in its brief that the Appellate Division did not reverse the lower court's decision is grossly inaccurate. The Appellate Division specifically concluded that the issue of assumption as regarding J.R.R. would be left for the NLRB's determination.

Not only is J.R.R. misstating the holdings of the Appellate Division, but it is in total contradiciton to the position that it took before the various courts in connection with its petition to stay the arbitration. Thus, in its memorandum of law

submitted to the Supreme Court before Special Term Part 1, J.R.R. affirmatively argued that the precise question that is presented to the Court is preempted by the National Labor Relations Act. J.R.R. submitted an eight page brief with numerous attachments arguing in support of its application to stay arbitration based on the argument that the issue should be decided by the National Labor Relations Board.

ARGUMENT

The decision of the Court of Appeals correctly applied settled legal principles to the particular facts of this case and does not conflict with any decision of this Court or of any other Court of Appeals. Accordingly, review by this Court is not warranted.

1. Petitioner challenges the Board's failure to grant full faith and credit to a New York State Supreme Court decision staying an arbitration involving the same parties, which Petitioner asserts constituted a final determination of the non-existence of a valid collective bargaining agreement between it and the intervenor.

The record clearly and unequivocably warrants a finding that the Supreme Court of the State of New York did not make a finding vis a vis

J.R.R.'s assumption of the contract. Although the lower court indicated that there was insufficient evidence that J.R.R. agreed to adopt the Union contract, the Court concluded that the NLRB was to dispose of the issue. On appeal, the Appellate Division refused to decide the merits and affirmatively concluded that identical issue had been presented for disposition before the Board and should be disposed of only by the Board so as to avoid the potential for inconsistent determinations. The Court held,

> "...the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latter's contention that it is not bound by J.A.R.'s contract with the union."

Accordingly, it is difficult to comprehend the logic of J.R.R.'s argument that the New York Court case

concluded that no agreement had been assumed and that the Union would therefore be collaterally estopped from raising the matter before the Board.

The cases cited by J.R.R. on the question of estoppel are therefore irrelevant. The premise relied upon in support of J.R.R.'s argument is a frivolous one, which seeks only to harass and delay in the ultimate disposition of the enforcement of this proceeding. Contrary to J.R.R.'s assertions, there is no "full faith & credit" argument. The state court affirmatively stepped aside to allow the NLRB to decide the question based on the statutory scheme intended by Congress in the creation of a uniform national labor relations policy. As the Administrative Law Judge noted, "Respondent pleaded successfully that

the arbitration be stayed since the same issues were brought before the Board." (ALJ Slip Opinion P. 3 fn. 3, App. A-16).

It is ironic that J.R.R. can assert before this Court a collateral estoppal argument, when before the state court it urged a stay of the arbitration so that the NLRB could decide the assumption issue. As noted, J.R.R. acknowledged to the state court that the issues submitted before that tribunal, as well as the NLRB, were identical. In its brief to the state court, J.R.R's counsel successfully convinced the lower court that the doctrine as enunciated in Garner v. Teamsters Local 726, 346 U.S. 485, 74 S.Ct. 161, precluded arbitraiton where the identical matter is before the Board.

Reviewing the case as it progressed, J.R.R., in arguing for collateral estoppel, relied on the following statement made by Judge Graci of the State Supreme Court:

> "There is nothing before this court to indicate that [J.R.R.] was a signatory of the agreement of collective bargaining, nor is there an indication in writing that [J.R.R.]had agreed with [J.A.R. Management], its predecessor in interest, to adopt the provision of the agreement between [J.A.R. Management] and [the Union].
>
> The law is clear and cases are legion that no one is under a duty to submit to arbitration unless by clear language he has so agreed [casess omitted]."

J.R.R. ignores the fact, however, that Judge Graci then immediately went on to make the following statement:

> "Moreover, as indicated herein, the Union submitted the same issue of unfair labor practice to the National Labor Relations

> Board. Accordingly, a state court is deprived of jurisdiction over the matter and the Union may not obtain arbitration on the same question [cases omitted]."

J.R.R. also ignores the fact that Judge Graci's judgment was significantly modified on appeal. The Appellate Division of the New York State Supreme Court, Second Department, modified Judge Graci's judgment in the following two ways (86 A.D.2d 596, 596, 446 N.Y.S.2d 193, 194 (1982)):

> (1) by adding to the decretal paragraph, immediately following the word "vacated," the following: "insofar as it affects [J.R.R.] and the motion to vacate the notice of intention to arbitrate as against [J.A.R. Management] is denied," and (2) by adding thereto aprovision that arbitration against [J.A.R. Management] is stayed pending the determination of the proceeding between [the Union] and [J.R.R.] before the National Labor

> Relations Board; upon conclusion of that proceeding, arbitration may resume to resolve those disputes arising out of the collective bargaining agreement between [J.A.R. Management] and [the Union] which have not been disposed of by the National Labor Relations Board.

Therefore, when J.R.R. cites Judge Graci's opinion and the judgment entered thereon, it neglects to note that such did not constitute the final judgment in the case. Accordingly, Judge Graci's judgment would not serve as a collateral estoppel.

In short, J.R.R. has failed to establish that Judge Graci's statement concerning adoption of the collective bargaining agreement collaterally estopped the Board from finding that J.R.R. adopted the agreement. Quite the contrary, the decisions of Judge Graci and the

Appellate Division of the State Supreme Court show that both of the state courts explicitly recognized that the issue of whether J.R.R. adopted the collective bargaining agreement was an issue that the state courts should not determine and that the Board should.

2. The law is clear that absent a specific undertaking, the Board will not impose a collective bargaining agreement of a predecessor upon a successor employer. However, in the matter at hand, the uncontroverted facts establish that when J.R.R. assumed title to the premises, it did so with the obligation that it assume the Union contract.

It is admitted by J.R.R. that Joshua Estates, Inc. was merely its nominee. The attorney for J.R.R. acknowledged that, notwithsanding the

parties listed-on the documents, the true purchaser was J.R.R. Hence, it must be assumed that the names of J.R.R. and Joshua Estates, Inc. are interchangeable.

When Joshua purchased the premises, in writing, it expressly assumed the obligations of the seller vis a vis the Union contract. This is sufficient to find an assumption. For, if a right is assigned to someone as part of an agreement, it can only be assumed that the assignment was accepted. The sale documents do not make any reference to J.R.R.'s rejection of the assignment.

Moreover, at the NLRB proceeding after various subpoenaed documents were turned over, it was further estabalished that an assignment of the Union contract was made.

J.R.R urges this Court to take the words "subject to" as constituting the entire record relating assignment of the Union contract. As noted above, the contract of sale and the closing documents contained numerous references to the Union contract. So although the sale may be said to be "subject to" the Union contract, it also appears that the Union contract was affirmatively assigned to J.R.R. and never rejected by J.R.R. At the closing the seller executed an assignment which stated that pursuant to the contract of sale, the seller assigned to J.R.R. "all the right, title and interest of the [seller] in and to the...Apartment House Agreement - 1979 with Local 32B-32S [sic] Service Employees."

Under general contract law, there must ordinarily be a valid transaction between two parties with an intent to vest the assignee with a present right on the thing assigned. (6A C.J.S. Assignments §43).

In addition, it is clear under the law that where rights under a contract are assigned, the instrument of assignment is not invalid for failure to have the signature of the other party. (see e.g., Kantor v. Aristo Hosiery Co., 222 A.D. 502, 226 N.Y.S. 582, aff'd 248 N.Y 630, 162 N.E. 553 (1928). Acceptance of the assignment can be inferred from the nature of the transaction (6A C.J.S. Assignments §63). In the matter at hand, the entire transaction compels a finding that there was an overt intent to create in the minds of all parties

to the transaction a belief that the union contract's assignment would be accepted. This was the seller's intent and J.R.R. never expressed any contradictory intent (until after the deal was consummated). J.R.R.'s actions during the closing clearly manifested an intent to assume the Union contract. This conculusion is warranted based on J.R.R.'s acceptance of pro-rated vacation monies and salaries earned by the unit employees through the date of the transfer of title.

Thus, even under traditional contract law, the Board was correct in its holding that J.R.R. was bound by the terms and conditions of the Union contract. However, the Board is not bound by technical questions of traditional contract interpretation.

The Board is free to use general contract principles adapted to the collective bargaining process to determine whether an agreement has been reached. NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1355 (9th Cir. 1981). If the Board's findings are based on substantial evidence, then this Court must affirm those findings. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); American Federation of Television and Radio Artists v. Inner City Broadcasting Corp., 748 F.2d 884, 886-887 (2d Cir. 1984); NLRB v. Donkins INn, Inc., 532 F.2d 138, 141-142 (9th Cir.) cert. denied. 429 U.S. 895 (1976).

3. Lastly, there is no basis for Petitioner's assertion that the Board failed to articulate the basis for its rejection of the collateral

estoppel argument. The Administrative Law Judge specifically found that Petitioner pleaded successfuly before the State Court that the arbitraiton be stayed since the same issues were brought before the Board (Pet. App. A-16 footnote 3). Likewise, the Circuit Court discounted J.R.R.'s contention when it noted in a footnote that the New York court granted the motion to stay arbitration finding that the Union's filing of an unfair labor practice claim with the Board deprived the state court of Jurisdiction to order arbitration. (Pet. App. A-5 footnote 3, A-6 footnote 4).

Accordingly, the Board, in affirming the decision of the Administrative Law Judge, had sufficiently and adequately set forth the facts upon which its action was

based. The fact that Petitioner's assertions needed only be dealt with in a footnote, establishes the weakness and frivolous nature of the argument. As can be seen from Judge Graci's decision and the decision of the Appellate Division, only a convoluted reading of same could result in the arguments presented by Petitioner.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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